

No. 4027

1349

United States

1349

Circuit Court of Appeals

For the Ninth Circuit.

HOWARD AUTOMOBILE COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Apellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

FILED

MAY 23 1923

W. D. MORGENTHAU

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

P. R. LUND, Esq., Attorney for Appellant, San Francisco, California.

UNITED STATES ATTORNEY, Attorney for Appellee, San Francisco, Calif.

In the United States District Court for the Northern District of California.

No. 12,996.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You are hereby requested to make up the record on appeal in the above-entitled cause including therein the following documents on file in your office:

1. Affidavit and petition of Howard Automobile Company for return of Buick Roadster together with Exhibit "A" attached thereto.

2. The answer of the United States of America to said petition together with any exhibits which may be thereto attached.

3. The order of court made and entered April 14th, 1923, denying the application of said Howard Automobile Company.

4. The petition for appeal.
5. Specification of errors.
6. Order allowing appeal.
7. Undertaking on appeal.
8. Supersedeas order.
9. Citation on appeal.

P. R. LUND,
Solicitor and Counsel for Appellant.

[Endorsed]: Filed at 10 o'clock and 15 Min.
A. M. Apr. 26, 1923. Walter B. Maling, Clerk.
By C. M. Taylor, Deputy Clerk. [1*]

In the United States District Court for the North-
ern District of California, Division One.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. O. KILDALL,
Defendant.

**Affidavit of Chas. T. Dodge and Petition of Howard
Automobile Company (for Return of Autom-
obile).**

State of California,
City and County of San Francisco,—ss.

Chas. T. Dodge, being first duly sworn, deposes
and says:

That at all of the times herein mentioned Howard
Automobile Company was and now is engaged in

*Page-number appearing at foot of page of original certified Trans-
cript of Record.

the manufacture and sale of automobiles in the City and County of San Francisco and at all of said times this affiant was and now is the Assistant Cashier of the said Howard Automobile Company and as such assistant cashier is fully familiar with the facts below stated and hence makes this affidavit on behalf of said Howard Automobile Company.

That on or about the 2d day of June, 1922, Howard Automobile Company sold and E. O. Kildall purchased from said Howard Automobile Company, one Buick Roadster Model K-44 No. 568,923.

That said sale was evidenced by a certain agreement in writing executed on the 2d day of June, 1922, and that a true copy of said agreement is annexed to this affidavit and made a part thereof for all purposes.

That the purchase price agreed upon between the buyer [2] and the seller for the said automobile was Nine Hundred Seventy-eight and 60/100 (\$978.60) Dollars, to that Three Hundred Seventy-eight and 60/100 (\$378.60) Dollars, was paid at the time of delivery of said automobile and subsequently thereto monthly payments upon the balance due were made so that at this time there remains due from the said date E. O. Kildall to Howard Automobile Company on account of the said balance of said purchase price the sum of Four Hundred Fifty-eight and 60/100 (\$458.60) Dollars.

That under the terms of said contract the legal title to said automobile remains in the Howard Automobile Company until the full purchase price

of Nine Hundred Seventy-eight and 60/100 (\$978.60) Dollars has been paid.

That affiant is informed and believes that the said E. O. KILDALL, the defendant herein, has no property or assets of record in the City and County of San Francisco upon which an execution could be levied.

That one of the provisions of said contract of sale is that the purchaser shall not at any time permit the said automobile to be removed from his possession or to permit any adverse claim of any character against the same, and not to operate the same contrary to law.

That affiant is informed and believes and on such information and belief states that in the month of October, 1922, in the City and County of San Francisco, State of California, the said defendant, E. O. Kildall, was arrested and the said automobile was seized for the alleged unlawful transportation of intoxicating liquor in violation of the so-called National Prohibition Act and that the said Automobile is now in the possession and custody of the United States Prohibition Enforcement Officer at San Francisco, California, and that said automobile is subjected [3] to the further order of this Court.

Affiant further states that at the time said automobile was entrusted to the care and custody of E. O. Kildall, defendant herein, this affiant had no knowledge or information nor has said affiant had any notice or information or suspected that at the time said automobile was entrusted to the care and custody of E. O. Kildall, defendant herein, and the

Howard Automobile Company had no knowledge or information nor has it had any notice or information or suspected that said E. O. Kildall, since that time intended to use or was using said automobile in unlawfully transporting intoxicating liquor.

CHAS. T. DODGE.

Subscribed and sworn to before me this 22d day of December, 1922.

[Seal]

GERALD A. GRIFFIN,

Notary Public, in and for the City and County of San Francisco, State of California.

Petition of Howard Automobile Company for Return of Automobile.

Wherefore your petitioner, Howard Automobile Company, prays for an order of this Court restoring and surrendering to it the said automobile in accordance with the provisions of said contract of sale hereto annexed, because of the breach by the purchaser of one of the essential conditions of said contract; or if the said automobile is not so restored and surrendered to your petitioner but the same be sold in the manner provided by law that in that event, the amount due your petitioner be paid in full out of the moneys realized from said sale, unless the amount paid for said automobile at the time of said sale be less [4] than the amount of the lien of your petitioner, Four Hundred Fifty-eight and 60/100 (\$458.60) Dollars, in

which event your petitioner prays that the said automobile be returned to your petitioner.

P. R. LUND,
Attorney for Petitioner, No. 444 California Street,
California.

Receipt of copy acknowledged this 26th day of
December, 1922.

JOHN T. WILLIAMS,
K.
U. S. Attorney.

[Endorsed]: Filed December 26, 1922. Walter
B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.

[5]

Lease

Howard Automobile Company,

E. O. Kildall,

hereinafter called "Lessor," hereby leases to

hereinafter called "Lessee," whose postoffice

address is 342 Lankershim Hotel, S. F.

and said Lessee hereby leases from

said Lessor, for a term commencing at the date hereof and ending on the 2nd day of June 1923, the following described property, to-wit:

That certain Brick Roadster Model K-44 No. 568923 together with all added or substituted parts placed thereon, whether caused by necessary repairs or otherwise, which said property is contemporaneously herewith delivered to the possession of said Lessee subject to the terms of this lease and not otherwise; and said Lessee agrees to pay to the Lessor, solely as consideration for the rental, hire and use of said property, the sum of Nine hundred seventy eight & 60/100 - - - 978.60 Dollars, U. S. Gold Coin,

to be paid in the following manner: \$300.00 upon the execution of this lease, and \$978.60 as follows:
\$56.50 on January 2, 1923; \$56.60 on May 2, 1923; \$56.50 on September 2, 1922.
\$56.50 on February 2, 1923; \$57.10 on June 2, 1923; \$56.50 on October 2, 1922.
\$56.50 on March 2, 1923; \$56.50 on July 2, 1922; \$56.50 on November 2, 1922.
\$56.50 on April 2, 1923; \$56.50 on August 2, 1922; \$56.50 on December 2, 1922.

and such other sums as are hereinafter mentioned, together with interest from date on all amounts of rent until paid, at the rate of eight per cent per annum, payable on the date that the installment of rent shall fall due.

(1) Said Lessee agrees during the life of this lease to exhibit said property upon demand to said Lessor or Lessor's agent, and as part of the rental thereof to keep said property in good order and repair to the satisfaction of Lessor, and free of all liens, and to promptly pay all taxes and licenses levied or assessed thereon, and to pay, from time to time, the premiums on policies of insurance thereon against fire, theft, transportation and collision. **Conf. & Embossment** to be immediately taken out by Lessor in Lessor's name; all policies to be retained by Lessor, and all payments of losses under said policies shall be in liquidation pro rata of the total rental. If said Lessee does not pay within five days any indebtedness due anyone having a lien or claim of lien thereon upon said property for any reason, or pay all taxes and licenses, or any premium on any insurance policy, all as aforesaid, the Lessor may pay therefor, and such payments shall be immediately repayable by said Lessee to said Lessor. If said Lessee does not keep said property in good order and repair, as aforesaid, the Lessor may, without suit or hindrance, take possession of said property and put it in good repair and condition at Lessee's expense, and the cost thereof may be paid by the Lessor, and such payments shall be immediately repayable by said Lessee to said Lessor; but the taking of possession of said property by the Lessor for said purpose shall not operate as a termination of this lease.

(2) Should said Lessee make default in the payment of any of the said several amounts when due, or in the event of Lessee's failure to perform any of the conditions and covenants herein contained, or in the event that the Lessee shall become financially involved or insolvent, or in the event that Lessee shall fail to pay the cost of said insurance, without notice or demand, all payments herein provided for shall be due and payable at once, or the Lessor may immediately take possession of said property, whenever and wherever found, without process of law using all necessary force to do so, and all payments previously made by the Lessee shall be construed to be and applied as compensation for depreciation in value and for the use of said property, and the Lessee hereby waives and relinquishes all rights to the moneys so paid and all rights against the Lessor for taking possession of said property.

(3) Any loss or destruction of, or damage to, said property, through any cause whatsoever, while not in the possession of Lessor, is at Lessee's risk; and Lessee shall not thereby be released from the obligation of paying the aforesaid rental and performing each and all of the provisions hereof.

(4) Said Lessee agrees that during the life of this lease, he will not, and has no right to, assign, pledge, mortgage, or otherwise dispose of this lease or possession of said property, or any part thereof, in any manner whatsoever, or use, or permit same to be used, for rental purposes, or remove the same from the State of California, or incur any bill or bills other than with Lessor for repairs to said property in excess of \$50.00, without the written consent of said Lessor.

(5) Said Lessee agrees to save said Lessor harmless from, and all liability, including all costs and attorney's fees, for injury or damage to persons or property caused in any manner, or in any place, by the use of said property during the life of this lease.

(6) In case suit is brought or other proceedings taken by Lessor to recover said property, or any part thereof, or any part of the amount due under this lease, said Lessee agrees to pay all costs, and there shall immediately become due and payable \$100 as and for attorney's fees to said Lessor, and said Lessee further agrees that in the event of a breach of any terms of this lease, the Lessor may, at his option, commence any action or proceeding in any county or city and county in the State of California, for the recovery of said property, and all or any part of the amount due under this lease.

(7) It is mutually agreed that all new tires, accessories and equipment of whatsoever character which may be installed upon or added to said property while same is in the possession of the Lessee, shall be deemed to become a part thereof and shall be surrendered with said property to said Lessor if he retakes possession thereof under any of the terms of this contract.

(8) The title to the said property shall remain solely in the Lessor until all of the said payments are made and all of the conditions herein contained fully complied with. Possession of said property shall give the Lessee no title or interest therein and no rights except as hereinafter provided. Upon the full performance of all of the said conditions and promises by the Lessee, the Lessor or his assigns will execute to the Lessee a Bill of Sale of the said property.

(9) Time is of the essence hereof in each and every particular, and the acceptance of any partial payment or of any payment after same is due hereunder, shall not be deemed a waiver thereof; and no person has any authority to waive, alter, or enlarge this lease, or to make any new or substituted or different lease, or any representation or warranty by the insertion of the same in this lease, or otherwise, or to bind the Lessor by any understanding, agreement, or representation, or by any act, lease, contract, or statement, that is not contained herein, unless such person has thereto been duly authorized in writing by the Lessor, or his manager.

(10) It is agreed that said property is now in good repair and condition and that this instrument contains the entire agreement between the parties and shall at all times be construed as a lease and option to purchase, as above provided, and not otherwise, and any benefit under any other construction is hereby waived. This lease shall not be binding on Lessor unless

signed by C. T. Dodge

(11) As a part of this lease, it is further agreed that in the event the Lessor shall assign and transfer this contract and the moneys payable thereunder to a third party, then the Lessee shall be precluded from in any manner attacking the validity of this contract on the ground of fraud, duress, mistake, want of consideration or failure of consideration or upon any other ground, and all moneys payable under this contract by the Lessee shall be paid to such assignee or bidder without recoupment, set-off or counter-claim of any sort whatsoever.

(12) It is distinctly understood and agreed that during the term of this lease, the automobile herein leased shall not be used for the transportation of intoxicating liquors, drugs or narcotics, and shall not be used in or about the violation of any United States, state or municipal statute, law or ordinance. Any violation of this provision shall forthwith terminate this lease and any and all rights of the Lessee in or to said automobile and the possession thereof, and without notice or demand of any character, the Lessor shall take immediate possession of said automobile and all accessories, using all necessary force to do so, and any and all rights of the Lessee in or to said automobile or the possession thereof shall thereupon be immediately forfeited and the Lessor shall be and become the sole owner of the same and such and every part thereof and right and interest therein and shall be alone and solely entitled to the possession thereof, and all payments previously made by the Lessee shall be retained for depreciation in value and for the use of said automobile, and the Lessee hereby waives all rights to the moneys so paid and all rights against the Lessor for taking possession of said automobile.

(13) This lease shall bind and inure to the benefit of the heirs, executors, and administrators of the parties hereto, and the assigns of Lessor.

(14) This lease is executed in duplicate, of which one copy is delivered to the Lessor, and the other copy is delivered to the Lessee.

Executed in duplicate at San Francisco California, this 2nd day of June 1922

The principal place of performance of all the terms mentioned herein is to be the city of San Francisco and

county of San Francisco

HOWARD AUTOMOBILE CO.

C. T. Dodge

Lessor,

(Signed) E. O. KILDALL

Lessee.

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7

COPY

DATE	PAID	BALANCE
5/8 22		678.60
-5 22	56.50	622.10
6-3 22	56.50	565.60
8-30 22	56.50	509.10
10-3 22	56.50	452.60

No. K-44

LEASE

From

HOWARD AUTOMOBILE CO

To

E. O. Kildall

518 Grand Hotel

San Francisco

Date 6-2-22 192

Payments to become due as follows:

Jan. 56.50	July 56.50
Feb. 56.50	Aug. 56.50
March 56.50	Sept. 56.50
April 56.50	Oct. 56.50
May 56.50	Nov. 56.50
June 57.10	Dec. 56.50

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 12,296.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH HATFIELD BAKER and EDDIE
OREN KILDALL,

Defendants.

Answer to Petition of Howard Automobile Company for Return of Property.

Comes now the above-named plaintiff, by John T. Williams as United States Attorney in and for the Northern District of California, acting for and in behalf of said plaintiff and Samuel F. Rutter, as Federal Prohibition Director in and for the State of California, and for answer to the petition of the defendant herein for a return of certain personal property, denies and alleges as follows:

Respondent has no information or belief respecting the allegation in petitioner's petition herein, to wit: "That petitioner has no knowledge, information or suspected that at the time said automobile was entrusted to the care and custody of E. O. Kildall intended to use or was using said automobile in unlawfully transporting intoxicating liquor" sufficient to enable him to answer the same, and basing his denial upon that ground denies

that petitioner had no knowledge or information, or did not suspect at the time said automobile was entrusted to the care and custody, or care or custody of the said E. O. Kildall, that the said E. O. Kildall intended to use or was using said automobile in unlawfully transporting intoxicating liquor.

Alleges: That the facts and circumstances respecting the taking of said automobile herein, are fully set out in the affidavit of Y. L. Harvill, who was at the time of the seizure of the said personal property a Prohibition Agent and acting as such, which said affidavit is hereto attached, made part hereof, and marked Exhibit "A." [8]

WHEREFORE respondent prays that the said petitioner's petition herein be denied.

JOHN T. WILLIAMS,

United States Attorney,

BEN F. GEIS,

Assistant United States Attorney,

Attorneys for Respondent. [9]

Exhibit "A."

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,296.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH HATFIELD BAKER and EDDIE
OREN KILDALL,

Defendants.

Affidavit of Y. L. Harvill.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Y. L. Harvill, being first duly sworn, deposes and says: That he is and at all of the times herein mentioned was in the employ of the Government of the United States as Federal Prohibition Agent, and acting as such under the direction of the Federal Prohibition Director of the State of California, to wit, Samuel F. Rutter.

That prior to the 23d day of October, 1922, one of the Federal Prohibition Agents, without disclosing his being such agent, made an agreement with the defendants for the purchase of certain intoxicating liquor, to wit, whiskey and gin, which was to be delivered by the said defendants to the said Federal Prohibition Agent on the 23d day of October, 1922, at and in the City and County of San Francisco, State of California; that affiant and other prohibition agents on the 23d day of October, 1922, and for the purpose of receiving delivery of said liquor, went to the Grand Hotel in said City and County of San Francisco, State of California, where the defendants then and there resided, and thereupon an automobile drove up in front of said hotel, one of the said defendants driving the said machine, and the [10] intoxicating liquor hereinbefore mentioned was then and there in the said automobile, and the other defendant together with afore-

said prohibition agent entered the said automobile and drove to Hyde Street between Golden Gate and Turk Streets, in the said City and County, followed by affiant and other prohibition agents, at which point affiant saw the other prohibition agent paying the said defendants for the said intoxicating liquor; that affiant and the other prohibition agents then and there arrested the said defendants, seized the said liquor and automobile, and which said liquor and automobile is now in the possession of Samuel F. Rutter as Federal Prohibition Director in and for the State of California; that at the time of said arrest and seizure the said defendant Kildall stated to affiant that he was the owner of the said automobile, which said automobile is the Buick roadster mentioned and described in petitioner's notice of motion herein; that at the time of the transporting of said liquor by the said defendants, the said defendants had not, nor had either of them any permit authorizing them or either of them to have possession of, or transport said or any intoxicating liquor; that immediately thereafter affiant filed an information charging the said defendants with possession and transportation of said intoxicating liquor.

Y. L. HARVILL.

Subscribed and sworn to before me this 27th day of January, 1923.

[Seal] C. W. CALBREATH,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Mar. 7, 1923. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,871.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DANIEL BELLI,
Defendant.

No. 12,188.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPE CAPACIOLI,
Defendant.

No. 12,296.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. O. KILDALL et al.,
Defendants.

No. 12,957.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JACK MODESTI,
Defendant.

Order Denying Motion (for Return of Automobile).

PARTRIDGE, JOHN S. [12]

In each of the above-entitled causes the defendants duly pleaded guilty and were punished for the illegal transportation of liquors contrary to the provisions of the National Prohibition Statute. In each case the liquor was found in an automobile and the automobile was seized and confiscated by the Government. The defendant in each case was in possession of the automobile by virtue of a contract of sale by which the title to the automobile was retained by the vendor, said title not to pass to the defendant until the payment of certain specified sums of money. All of these contracts were in the form of conditional sales, long recognized under the law of California.

In the first three causes the matters are before the Court on petitions for return of the automobile by the vendor. In the last cause, however, the vendor does not ask for the return of the automobile, but applies for an order establishing a lien upon the proceeds of the sale, to the extent of the balance of the unpaid purchase price.

Section 26 of the National Prohibition law provides:

“Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team, or automobile . . . and shall arrest any person in charge thereof. The courts, upon conviction of the person so ar-

rested, shall order the liquor destroyed and, unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale . . . shall pay all liens according to the priority, which are established as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of the liquor.”

[13]

It is not by any means easy to reconcile the decisions upon Section 26 of the Act. Judge Thomas, District Judge of the District of Connecticut in *United States vs. Silvester*, 273 Fed. 253, allowed a lien for the amount of the unpaid purchase price under what the opinion calls “a conditional bill of sale,” although he denied the return of the automobile. The opinion seems to treat the unpaid purchase price as a lien upon the property. He denied the petition for the return of the automobile, however, upon the theory that that would permit “a lienor or mortgagor to profit by the transaction and that result was never intended by the framers of the law.”

Quite recently Judge Dooling of this District, sitting in the District of Arizona, in the *United States vs. Marshal Montgomery et al.*, held distinctly and emphatically that the vendor under a conditional bill of sale has no lien upon the automobile. He gives this as his reason: “It is not unreasonable to suppose Congress had in mind the fact that an

owner may determine who shall have the use of a vehicle and thus, in a measure, control such use, while a lienor may not, because he is at no time entitled to its possession.”

It seems to me that this is clearly the proper rule to apply in a case arising under a contract of conditional sale made and to be performed in the State of California. It is perfectly well settled in this State that under one of these conditional contracts for the sale of personal property, the title remains in the vendor and if the property is destroyed the loss falls upon him. *Potts Company vs. Benedict*, 156 Cal. 322; *Waltz vs. Silveria*, 25 Cal. App. 717. It is equally well settled that the vendor has his option of either of two remedies upon the failure of the vendee to pay the balance of the purchase price: [14]

First, he can take back the property because the title is still in him;

Second, he can waive this right, treat the sale as absolute, and sue for the balance; but he cannot do both. *Park & Lacey Company vs. White River Lumber Company*, 101 Cal. 37; *Holt Manufacturing Company vs. Ewing*, 109 Cal. 353; *Waltz vs. Silveria*, *supra*; *Muncy vs. Brain*, 158 Cal. 300; *Adams vs. Anthony*, 178 Cal. 158.

Reference was made on the argument and the submission of authorities to the recent case of *McDowell vs. United States* No. 3865, decided by the Circuit Court of Appeals for this Circuit on February 5th. In that case, however, the real question involved was whether Section 3450 of the Re-

vised Statutes had been repealed by the provisions of the National Prohibition Act. It was clearly recognized that under Section 3450, the conveyance in which goods were moved in an attempt to defraud the United States of a tax was absolutely forfeited, whether or not the person so conveying the goods was the actual owner of the vehicle or not. In that case the Court says that this provisions of the Revised Statutes was in effect repealed by Section 26 of the National Prohibition Act. It is therefore apparent that unless language is found in Section 26 which would relieve the vendor under a conditional bill of sale from the provisions of forfeiture and sale, that those latter provisions would authorize the Government to seize and sell the conveying vehicle. As Judge Dooling points out in his decision, no such language is found.

It is clear to me, therefore, that at least in California, the following conclusions are inevitable:

[15]

1. The vendor under a conditional bill of sale retaining title to the property in himself cannot compel the return of the property by the Government;

2. Such a vendor has no lien upon such a vehicle for the very simple reason that he is the owner thereof.

The motions, therefore, in each case will be denied.

Dated: April 14, 1923.

[Endorsed]: Filed Apr. 14, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [16]

In the United States District Court for the Northern District of California.

No. 12,296.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL,

Defendant.

Petition for Appeal.

To the Honorable JOHN S. PARTRIDGE, District Judge.

The Howard Automobile Company, petitioner herein, feeling aggrieved by the order and decree rendered and entered in the above-entitled cause on the 14th day of April, A. D. 1923, does hereby appeal from said order and decree to the Circuit Court of Appeals for the Ninth Judicial Circuit for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and document upon which said order and decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, sitting at San Francisco, under the

rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

P. R. LUND,
Solicitor and Counsel for Appellant.

[Endorsed] Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[17]

In the United States District Court for the Northern District of California.

No. 12,296.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL,

Defendant.

Assignment of Errors.

Now comes the Howard Automobile Company, petitioner herein, in the above-entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause, from the decree and order made by this Honorable Court on the 14th day of April, 1923.

I.

That the United States District Court for the Northern District of California erred in refusing

to render an order and decree pursuant to the petition of the Howard Automobile Company, filed in the above cause, applying for the return of it, the said Howard Automobile Company, of a certain Buick Roadster in said petition described.

II.

That the United States District Court for the Northern District of California erred in refusing to decree that the Howard Automobile Company have a lien, after deducting the cost of seizure and expenses of keeping and sale of the certain Buick Roadster, described in the petition of said Howard Automobile Company filed herein, to the extent of Four Hundred [18] Fifty-eight and 60/100 (\$458.60) Dollars.

III.

That the United States District Court for the Northern District of California erred in refusing to decree that the Howard Automobile Company have a lien upon the proceeds of the sale of the certain Buick Roadster described in the petition of the said Howard Automobile Company filed herein.

P. R. LUND,
Solicitor and Counsel for Appellant.

[Endorsed]: Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[19]

In the United States District Court for the Northern District of California.

No. 12,296.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL,

Defendant.

Order Allowing Appeal.

On motion of P. R. Lund, Esq., solicitor and counsel for the Howard Automobile Company, petitioner herein, it is hereby ordered that an appeal to the Circuit Court of Appeals for the Ninth Judicial District from an order and decree heretofore filed and entered herein, be, and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Circuit Court of Appeals for the Ninth Judicial District. It is further ordered that the bond on appeal be fixed in the sum of \$500.00, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

JOHN S. PARTRIDGE,

Judge.

Dated this 24th day of April, 1923.

[Endorsed]: Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

In the United States District Court for the Northern District of California.

No. 12,996.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL,

Defendant.

Supersedeas Order.

This cause coming on to be heard this — day of April, 1923, upon the application of the appellant for an appeal to the Circuit Court of Appeals for the Ninth Judicial District and said appeal having been allowed, it is ordered that the same shall act as a supersedeas, the said appellant having executed bonds in the sum of \$500.00 as provided by law, and the Clerk is hereby directed to stay the mandate of the District Court of the Northern District of California until the further order of this court.

JOHN S. PARTRIDGE.

[Endorsed]: Filed Apr. 26, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[21]

In the United States District Court for the Northern District of California.

No. 12,996.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL,

Defendant.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That the Globe Indemnity Company, a corporation organized and existing under the laws of the State of New York, and licensed and authorized to conduct a bonding and surety business within and under the laws of the State of California is held, and firmly bound unto the United States of America in the full and just sum of \$500.00 to be paid to the said United States of America; to which payment well and truly to be made, the said Globe Indemnity Company hereby binds itself, its successors and assigns, by these presents.

Signed, sealed and executed at San Francisco, California, this 26th day of April, A. D. 1923, on behalf of the Globe Indemnity Company by its attorney-in-fact, thereunto duly authorized.

Whereas, lately at a District Court of the United States for the Northern District of California in the above-entitled cause depending in said Court, an order and decree was rendered against the

Howard Automobile Company, petitioner, in intervention in said action, and the said Howard Automobile Company having obtained from the Court, an appeal to reverse the order and decree [22] in the aforesaid intervention and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Howard Automobile Company shall prosecute to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

GLOBE INDEMNITY COMPANY,
 (Signed) By J. B. ELLIOTT, (Seal)
 Attorney-in-fact.
 J. B. ELLIOTT.

Form of bond and sufficiency of sureties approved.

JOHN S. PARTRIDGE,
 Judge.

[Endorsed]: Filed Apr. 26, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
 [23]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 23

pages, numbered from 1 to 23, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of United States of America, vs. Eddie Oren Kildall et al. (Howard Automobile Co, Claimant of Automobile), No. 12,-296, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein) and the instructions of the attorney for claimant and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Eight Dollars and Seventy-five cents (\$8.75), and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto is the original citation on appeal herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 8th day of May, A. D. 1923.

[Seal]

WALTER B. MALING,
Clerk.

By C. M. Taylor,
Deputy Clerk. [24]

(Citation on Appeal.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to UNITED STATES OF AMERICA and to the Honorable JOHN T. WILLIAMS, United States Attorney, GREETING:

You are hereby cited and admonished to be and

appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein United States of America is plaintiff and E. O. Kildall is defendant and petitioner in intervention, Howard Automobile Company, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 26th day of April, A. D. 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: No. 12,296. United States District Court for the Northern District of California. Howard Automobile Company (a Corporation), Appellant, vs. United States of America. Citation on Appeal. Filed Apr. 26, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[25]

[Endorsed]: No. 4027. United States Circuit Court of Appeals for the Ninth Circuit. Howard Automobile Company, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed May 8, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

